IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII Rule 32 (2)(b)

Description of the Case.

Criminal Appeal No. 818 of 2001 . decided on 13-05-2003

Sunil Kumar Vs. State

A.F.R. (Approved for reporting)

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Not approved for reporting

Date of decision 13.5.2003 Initial of Judge

Note- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

Reserved

COURT No.2

Criminal appeal no. 818 of 2001.

Sunil Kumar - Appellant.

Versus

State of Uttaranchal - Respondent

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Hon. P.C. Verma, ACJ.
Hon. Irshad Hussain, J.

(Delivered by Hon'ble Irshad Hussain,J.)

Appellant has been convicted and sentenced to life imprisonment under section 302 I.P.C. per judgment and order dated 16.05.2001 passed by the then Additional Sessions Judge, Kashipur, district Udham Singh Nagar in session trial no.39 of 2000.

Briefly stated the prosecution case was the appellant is the adopted son of complainant Subhash Chandra. Complainant's first wife had died. His second wife Smt. Shashi was pregnant when the occurrence took place. According to prosecution complainant and his adopted son, the appellant were not at peace due to some family dispute and appellant was made to leave he house by the complainant about a week before the occurrence and since then he was residing in a room separately. Appellant used to give threat to kill the complainant and his wife. The appellant had even pilfered the locks of the shop of the complaint and was reprimanded for this act by the complainant.

On 01.08.1999 at about 2:25 P.M. appellant came to the house of the complainant and after making uncomplimentary remarks against his wife gave out that he will kill her and started assaulting her by knife which he was then carrying. Complainant and his wife Smt. Shashi raised alarm

thereby attracting witness Rajesh at the scene of the occurrence. Complainant's wife Smt. Shashi succumbed to the injuries of knife sustained at the hands of the appellant.

Report of the occurrence, Ext.ka.1 was lodged by the complainant at the police station the same day at 3:30 P.M. and investigation was entrusted to sub inspector Mohd. Anis who on completion of the investigation submitted charge-sheet against the appellant.

In the trial prosecution examined only two witnesses, viz., Subhash Chandra (P.W.1), the complainant eye witness of the occurrence and another charge witness Rajesh Kumar (P.W.2). Appellant pleaded not guilty to the charge and gave out that the witnesses have given false statement against him. The learned Sessions Judge on appreciation of the evidence and material on record found the appellant guilty and convicted and sentenced him as aforementioned.

Heard Sri Lokendra Dobhal, learned counsel for the appellant and the learned A.G.A.

Learned counsel for the appellant urged that no doubt the death of Smt. Shashi as is evident from the postmortem report was homicidal, but there was no sufficient evidence to connect the appellant with the crime in question firstly because the relevant evidence of the prosecution was not brought on record by examination of the witnesses causing prejudice to the appellant and also resulting in failure of justice and secondly because of the incrimination circumstances which were used against the appellant were not put to him while recording his statement under section 313 of the Code of Criminal Procedure so as to enable him to offer explanation. From the record it is revealed that according to prosecution appellant was arrested on 02.08.1999 wearing blood stained shirt and at his instance knife, weapon of assault was also recovered. The learned Sessions Judge felt content by getting the endorsement of the defence counsel to the effect that formal proof of the documents of the arrest and recovery admitted, but did not ensure the production of the witnesses of arrest and recovery so that their ensure the production of the witnesses of arrest and recovery (Ext.ka. 7 and Ext.ka.8 respectively) are not the substantive piece of evidence as the factum

of arrest of the appellant wearing blood stained shirt and recovery of knife at his instance could only have been established by evidence of the relevant witnesses of prosecution. Blood stained short, knife and other case property was sent for chemical examination and the learned Sessions Judge also did not ensure the production of report of chemical examiner and consideration of the evidence having bearing on the matter in issue. The investigating officer was not examined although he was also the witness of arrest and recovery of knife at the instance of the appellant and against the endorsement of the defence counsel on the relevant documents was found to be sufficient in proof of the claim of the prosecution and by not examining the witnesses of these facts the cause of the defence was definitely prejudiced and non-production of the important witnesses has resulted in failure of justice.

Further as stated above in regard to the case of the prosecution certain incriminating circumstances were disclosed from it and these were reiterated by the complainant eye witness Subhash Chandra (P.W.1) in his evidence. Statement of appellant under section 313 of Code of Criminal Procedure reveal that all the incriminating circumstances were not put to the appellant to enable him to offer explanation. Besides those circumstances factum of alleged arrest with blood stained shirt and recovery of the knife at the instance of the appellant were not also put to him in the statement although many of these circumstances as pointed out by the learned counsel for the appellant were made basis for placing reliance on the evidence of the witness and also on the prosecution story without the appellant being given any opportunity to say anything about those circumstances. Learned A.G.A. also conceded that the non-examination of the witness on above important facts and also improper recording of the statement of the appellant has resulted in failure of justice and the trial held is unsatisfactory.

In view of the above matter and also considering the fact that the murder of a pregnant woman was committed in a gruesome manner, the matter need to be remanded to the trial court after setting aside the impugned judgment and order with a direction that evidence on the relevant facts referred above shall be taken on record and all the incriminating circumstances of whatever nature which are to be used against the appellant

must be put to him under section 313 Code of Criminal Procedure to enable him to offer explanation. The appellant shall also, in case he desires, be given opportunity to adduce evidence and thereafter the trial court shall pass a reasoned judgment. The remand is limited in scope to the extent as stated above.

In view of the above the impugned judgment and order dated 16.05.2001 of conviction and sentence are hereby set aside and the trial court is directed to decide the case expeditiously in the light of the observations made above. Let the record of the case be sent back at once to the trial court. Since the case is remanded, the appellant is directed to be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the concerned court.

May 13, 2003/B.

(Irshad Hussain, J.) **(P.C. Verma, ACJ.)**